Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
	)	
Open Video Systems	)	

U S WEST, INC. OPPOSITION TO PETITIONS FOR RECONSIDERATION

U S WEST, Inc. ("U S WEST"), through counsel and pursuant to the Federal Communications Commission's ("Commission") Open Video Systems Order,[1] hereby files its opposition to Petitions for Reconsideration ("Petitions" or "PFRs") requesting that the Commission modify its OVS Order.[2]

---

[1] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, Second Report and Order, FCC 96-249, rel. June 3, 1996 ("OVS Order").

[2] Petitions for Reconsideration and/or Clarification were filed herein by Alliance for Community Media, et al. ("Alliance"); Association of Local Television Stations, Inc.; AT&T Corp.; City of Indianapolis; Comcast Cable Communications, Inc.; Cox Communications, Inc. ("Cox"); ESPN, Inc.; Joint Parties of the Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; SBC Communications, Inc. and Southwestern Bell Telephone Company; MCI Telecommunications Corporation; Metropolitan Dade County; Michigan, Illinois and Texas Communities ("MIT"); Municipal Administrative Services, Inc.; National Cable Television Association, Inc. ("NCTA"); The National League of Cities, et al. ("NLC"); NYNEX Corporation; Office of the Commissioner of Baseball; Rainbow Programming Holdings, Inc.; TELE-TV; U S WEST; Village of Schaumburg.

Many parties used their PFRs as an opportunity to reargue positions contained in their initial comments that the Commission declined to adopt in the OVS Order. The Commission should dismiss these arguments "out-of-hand" as inappropriate for reconsideration.[3] In most cases, the parties do no more than recycle previously-rejected arguments; they offer neither new evidence nor legal arguments to support their positions. As in prior video dialtone (or "VDT") proceedings, some parties claim that more rules and safeguards are necessary before the Commission can allow local exchange carriers ("LEC") to enter the open video system (or "OVS") business.[4] This is nonsense. In eliminating the Commission's video dialtone rules and adopting the 1996 Act's OVS provisions,[5] Congress made it quite clear that it did not want the Commission to adopt burdensome Title II-like rules for open video systems.

As U S WEST observed in its Petition for Clarification, the OVS Order is comprehensive and well thought-out. On reconsideration, little needs to be done other than filling the few gaps that remain in the original OVS Order. Clearly, there is no need to modify the core of the OVS Order as some parties suggest. In the interests of brevity and efficiency, U S WEST only responds to selected arguments raised by petitioners. No purpose would be served by responding to

---

[3] See 47 CFR § 1.429(b).

[4] NCTA at 21-23; Alliance at 2-4.

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 118-24 §§ 651, 652, 653 (1996) ("1996 Act").

arguments and positions that the Commission has previously rejected -- the Commission can easily identify them.

I. THE COMMISSION'S INTERPRETATION THAT SECTION 653(a)(1) ALLOWS CABLE OPERATORS TO BECOME OVS OPERATORS IS A PERMISSIBLE' CONSTRUCTION OF THE STATUTE

NLC and MIT argue that the Commission erred in its finding that cable operators may become OVS operators under certain circumstances.[6] U S WEST disagrees. The Commission's interpretation of the statute was quite reasonable in light of the fact that it anticipates many cable operators also will be acting as LECs within their cable franchise areas. Thus, contrary to the assumptions of NLC and MIT, an interpretation of the statute that limited OVS operations to LECs would not bar such cable operators from becoming OVS operators. The Commission's finding that cable operators may become OVS operators only if they face "effective" competition in their franchise areas -- regardless of whether these same cable operators provide local exchange telephone service -- serves the public interest and recognizes that the term "LEC" may include many firms other than "incumbent" LECs.[7]

Furthermore, the Commission did not exceed its authority when it concluded "that Section 653(a)(1) does not preclude entities other than LECs from becoming

---

[6] NLC at 16-19; MIT at 3-7.

[7] In fact, the statute is quite clear in distinguishing between incumbent LECs and new entrants to the local exchange business. See 1996 Act, 110 Stat. at 65 § 251(h).

open video system operators."[8] Neither Section 653(a)(1) nor other sections of the 1996 Act are unambiguous. In those cases where a statute is silent or ambiguous, Courts will defer to the Commission's interpretation as long as it is a "permissible" construction of the statute.[9] The Commission's interpretation clearly satisfies this standard.

II. CONGRESS INTENDED THAT THE OVS CERTIFICATION PROCESS BE STREAMLINED

The Commission should reject the requests of NCTA and Alliance that detailed and burdensome precertification requirements be imposed on potential OVS operators.[10] If NCTA and Alliance had their way, they would turn the OVS certification process into a long arduous process closely resembling earlier Section 214 proceedings for VDT under Title II regulation. These overtures are totally at odds with Congressional intent. Rather than deterring non-compliance as NCTA suggests,[11] such an approach would erect a barrier to entry and deter LECs from even considering OVS as a means of delivering video programming to the home.

The statutory prohibition on requiring Section 214 approval for video programming delivery systems[12] and the ten day time limit for acting on OVS

---

[8] OVS Order ¶ 18.

[9] Chevron U.S.A., v. Natural Resources Defense, 467 U.S. 837 (1984).

[10] NCTA at 2-5; Alliance at 15-18.

[11] NCTA at 4.

[12] 1996 Act, 110 Stat. at 119 § 651(c).

certification filings[13] cannot be viewed as anything other than a repudiation of the Section 214 process that was used to evaluate LEC VDT applications. In promulgating rules to implement the certification requirements of the 1996 Act, the Commission wisely chose to adopt a streamlined approach which reflects the clear intent of Congress. The Commission should not modify its streamlined certification process on reconsideration.

III. NLC ERRS IN ITS CLAIM THAT THE COMMISSION DOES NOT HAVE AUTHORITY TO PREEMPT STATE AND LOCAL FRANCHISING REQUIREMENTS

NLC asserts that the Commission does not have the authority to preempt non-Title VI state and local franchise requirements which might be imposed on OVS providers.[14] NLC is wrong. NLC basically claims that cities and states have the right to impose unique local franchise requirements on OVS operators for use of public rights-of-way as long as these franchise requirements are not Title VI requirements. Contrary to NLC's claim, the key is not how these requirements are labeled -- but their effect. If the local requirements are Title VI-like requirements that would frustrate Congress' intent in adopting the 1996 Act's OVS provisions, there is no question that the Commission has sufficient authority to preempt any such requirements.[15] Whereas, if the local requirements which apply to OVS

[13] Id. at 121-22 § 653(a)(1).

[14] NLC at 3.

[15] Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 368-69 (1986).

operators' use of the public rights-of-way are competitively neutral and non-discriminatory, the Commission would have no grounds for preemption.[16] NLC's preemption argument has no legal basis and must be rejected by the Commission.

IV. THE COMMISSION SHOULD ADOPT TELE-TV'S SUGGESTION ON THE APPLICATION OF THE MUST CARRY/RETRANSMISSION CONSENT RULES TO OPEN VIDEO SYSTEMS

In adopting its OVS Order, the Commission declined to adopt U S WEST's proposal that broadcasters be required to make the same must carry/retransmission consent election for all competing cable service providers (i.e., cable operators and OVS operators).[17] The Commission's primary reason for not adopting U S WEST's proposal which is essentially a mirror image of Section 325(b)(3)(B) requirements[18] (i.e., which apply in the case of overlapping cable systems) was due to the potential size difference between OVS and cable systems.

Clearly, OVS providers would be competitively disadvantaged if broadcast programming is available on a competing cable system but unavailable on OVS due to the failure to obtain retransmission consent. TELE-TV's proposal overcomes this problem by recognizing that open video systems may have the capability to distinguish between subscribers in different franchise areas and block programming where necessary to comply with retransmission consent requirements.[19] This would

---

[16] OVS Order ¶ 209.

[17] Id. ¶ 169.

[18] 47 USC § 325(b)(3)(B).

[19] TELE-TV at 12.

allow an OVS operator to provide the same broadcast programming to subscribers in one franchise area on a must carry basis and in another franchise area under retransmission consent. Where OVS operators have the capability to allow broadcasters to make multiple must carry/retransmission consent elections within a single larger open video system, there is no basis for requiring a broadcaster to make a single election for an open video system.

Allowing broadcasters to make multiple elections in the case where an open video system spans multiple cable franchise areas would address the competitive concerns of OVS operators and give broadcasters greater flexibility. Therefore, U S WEST recommends that the Commission modify its current rule as TELE-TV has proposed. That is -- "where an OVS operator and OVS programming providers can distinguish among subscribers according to the cable franchise area in which they live, where the open video system coincides with a single cable franchise area, or where the open video system is coextensive with multiple cable areas where broadcasters have made consistent elections, broadcasters should be required to make the same retransmission election as was made for the competing cable operator(s)."[20]

V. CONCLUSION

U S WEST urges the Commission to clarify its OVS Order as discussed in U S WEST's Petition for Clarification.[21] Additionally, the Commission should

---

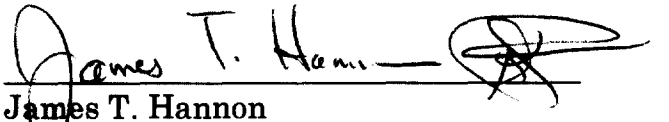
[20] Id. at 13.

[21] U S WEST Petition at 3-8.

modify its must carry/retransmission consent rules to incorporate TELE-TV's proposal as discussed above. No further changes in the Commission's OVS Order are required on reconsideration. Accordingly, the Commission should deny all other Petitions.

Respectfully submitted,

U S WEST, INC.

By: 

James T. Hannon
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2860

Its Attorney

Of Counsel,
Dan L. Poole

July 15, 1996

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 15th day of July, 1996, I have caused a copy of the foregoing **U S WEST, INC. OPPOSITION TO PETITIONS FOR RECONSIDERATION** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.

Kelseau Powe, Jr.

***Via Hand-Delivery**

(CS9646D.COS/JH/lh)

*James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

*Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

*Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

*Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

*Rick Chessen
Federal Communications Commission
Room 399
2033 M Street, N.W.
Washington, DC 20554

*Meredith J. Jones
Federal Communications Commission
9th Floor
2033 M Street, N.W.
Washington, DC 20554

*Regina M. Keeney
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

*Larry Walke
Federal Communications Commission
Room 408-A
2033 M Street, N.W.
Washington, DC 20554

*John E. Logan
Federal Communications Commission
Room 920
2033 M Street, N.W.
Washington, DC 20554

*Tom Power
Federal Communications Commission
Room 406-I
2033 M Street, N.W.
Washington, DC 20554

*Gary Laden
Federal Communications Commission
Room 406-A
2033 M Street, N.W.
Washington, DC 20554

*International Transcription
Services, Inc.
Suite 140
2100 M Street, N.W.
Washington, DC 20037

Tillman L. Lay
Frederick E. Ellrod, III
Kristin M. Neun
Miller, Canfield, Paddock and Stone, PLC
Suite 400
1225 19th Street, N.W.
Washington, DC 20036

Georgia N. Crump MAS
Lloyd, Gosselink, Fowler, Blevins &
Mathews, PC
POB 1725
Austin, TX 78767

Jeffrey S. Hops
Alliance for Community Media
Suite 806
666 11th Street, N.W.
Washington, DC 20001

John Podesta
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001

James Horwood
Spiegel & McDiarmid
Suite 1100
1350 New York Avenue, N.W.
Washington, DC 20005

Jill Lesser
People for the American Way
Suite 400
2000 M Street, N.W.
Washington, DC 20005

Gigi Sohn
Andrew Jay Schwartzman
Media Access Project
Suite 400
2000 M Street, N.W.
Washington, DC 20036

James J. Popham
Association of Local Television Stations, Inc.
Suite 300
1320 19th Street, N.W.
Washington, DC 20036

Mark C. Rosenblum
Ava B. Kleinman
AT&T Corp.
Room 3245F3
295 North Maple Avenue
Basking Ridge, NJ 07920

Michael S. Schooler COMCAST
Dow, Lohnes & Albertson, PLLC COX
Suite 800
1200 New Hampshire Avenue, N.W.
Washington, DC 20036-6802
(2 Copies)

Thomas R. Nathan
Comcast Cable Communications, Inc.
1500 Market Street
Philadelphia, PA 19102

Edwin M. Durso
David R. Pahl
Michael J. Pierce
ESPN, Inc.
ESPN Plaza
Bristol, CT 06010-7454

Margaret E. Garber
Pacific/Nevada Bell
4th Floor
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004

Lucille M. Mates
Christopher L. Rasmussen
Sarah R. Thomas
Pacific/Nevada Bell
Room 1522-A
140 New Montgomery Street
San Francisco, CA 94105

James D. Ellis
Robert M. Lynch
David F. Brown
SBC Communications, Inc.
Room 1254
175 East Houston
San Antonio, TX 78205

Mary W. Marks
Southwestern Bell Telephone Company
Room 3558
One Bell Center
St. Louis, MO 63101

John W. Pestle, MULT
Patrick A. Miles, Jr.
Varnum, Riddering, Schmidt
& Howlett, LLP
Bridgewater Place
POB 352
Grand Rapids, MI 49501-0352

Robert A. Lewis
Donald C. Rowe
NYNEX Corporation
Room 1206
111 Westchester Avenue
White Plains, NY 10604

Michael K. Kellogg TELE-TV
Austin J. Schlick
Kevin J. Cameron
Kellogg, Huber, Hansen, Todd & Evans
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005

Karen Stevenson
TELE-TV
15th Floor
875 3rd Avenue
New York, NY 10022

Lawrence Fester
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

Mario E. Goderich
Metropolitan Dade County
Room 901
140 West Flagler Street
Miami, FL 33130

Donna N. Lampert RAINBOW
Gregory R. Firehock
Fernando R. Laguarda
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo, PC
Suite 900
701 Pennsylvania Avenue, N.W.
Washington, DC 20004

Philip L. Verveer NCTA
Sue D. Blumenfeld
Thomas Jones
Willkie, Farr & Gallagher
Suite 600
Three Lafayette Center
1155 21st Street, N.W.
Washington, DC 20036-3384

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
National Cable Television
Association, Inc.
1724 Massachusetts Avenue, N.W.
Washington, DC 20036

Rick Maultra
City of Indianapolis
WCTY Government Channel 16
Room G-19
City and County Building
200 East Washington Street
Indianapolis, IN 46204

Philip R. Hochberg NBA/NFL/NHL
Verner, Liipfert, Bernhard
McPherson and Hand
Suite 700
901 15th Street, N.W.
Washington, DC 20005

Robert Alan Garrett COB
Arnold & Porter
555 12th Street, N.W.
Washington, DC 20036

(CS9646D.JH/lh)
Last Update: 7/15/96

George Longmeyer
Villiage of Schaumburg
101 Schaumburg Court
Schaumburg, IL 60193-1899